IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 17 OF 2006

M/s.Mainland Docks Limited,
Vasco Da Gama. ... Appellant.

V/s.

1. Asst.Commissioner of
   Income-tax, Circle-2,
   Margao.

2. Income-tax Appellate
   Tribunal, Panaji Bench,
   Pundalik Niwas, Panaji,
   Goa. ... Respondents.

R.Srinivasan with S.M.S.Usgaonkar and
Melwyn J. Aguiar for the appellant.

S.R.Rivankar for the respondents.

CORAM : V.C.DAGA AND
N.A. BRITTO, JJ.

DATED : 7th August 2006.

ORDER :

This appeal is at the instance of the assessee filed under section 260A of the Income Tax Act, 1961 ("Act" for short); wherein the following

questions of law; said to be substantial questions of law, are sought to be raised:

a) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in disallowing interest on borrowed funds utilized by the partner for the purpose of the business of its partnership-firm?

b) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in blindly accepting the order of the Commissioner (Appeal) regarding the applicability of section 40A(2) while the facts are to the contrary?

2. The undisputed facts reveal that the amount borrowed by the appellant- assessee from Mrs.Sarita P. Shirke came to be advanced to M/s.Dolphin & Co. wherein the assessee is a partner. This amount was borrowed from Mrs.Sarita Shirke on interest at the rate of 14% per annum, whereas the amount advanced to M/s.Dolphin & Co. carried interest at the rate of 4% per annum. The amount of difference of interest i.e. @10% was sought to be claimed as deduction.

3. The assessing officer rejected the claim of the assessee on the following findings which read as under:

> " The assessee in his submission is also giving emphasis that the money borrowed is invested in partnership firm and interest @4% has been charged in view of partnership deed and the assessee claims it that the interest liability incurred is on account of commercial expediency of business. Under no circumstances, the assessee's above act can be considered from the angle of business prudency. No prudent businessman will create interest liability in his own case and charge interest on this on very very negligible rate. As far as partnership deed is concerned, i.e. between his own concern and for such type of situations the Hon'ble Supreme Court in case of Mcdowell & Co. Ltd. 154 ITR 148 has already held that the tax planning may be legitimate provided it is within the framework of law and colourable devices can not be part of tax planning ....."
>
> In view of these discussions, the excess interest liability of Rs.47,31,012/-, the difference of interest paid Rs.1,02,57,730/- and interest received Rs.55,26,718/- is accordingly being disallowed and added to assessee's total income."

4. The above order was challenged before the Commissioner of Income Tax (Appeals) ("CIT (Appeals)" for short). The CIT (Appeals) after threadbare dissection of the factual aspects and the nature of transaction involved, rejected claim of the assessee and recorded findings as under:

> " ..... In this circuitous process, considerable interest liability has been manufactured or artificially created in the hands of the appellant which far exceeds its corresponding interest earnings, thus reducing its tax liability. There is absolutely no business or economic consideration for taking this circuitous route for equity participation in MPL.
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> ..... In the present case, from the discussion here-in-above, it is proved beyond doubt that there was no legitimate business need nor any benefit derived from the borrowings made at the interest rate of 14%. It was used just for making advances at the interest rate of 4%. The differential interest could thus be disallowed u/s 40A(2) as well, on account of being excessive to that extent."

5. Being aggrieved by the aforesaid order, the assessee preferred appeal before the Income Tax Appellate Tribunal, Panaji Bench ("Tribunal" for short) which came to be rejected on the following findings recorded by the Tribunal, which read as under:

> " We have considered the rival submissions. There is no dispute that all the persons involved in the matter under dispute belonged to Chowgule Group. It is also not in dispute that the assessee had borrowed substantial sum of money from M/s.Smt.Sarita P. Shirke @ 14% which the assessee decided to lend at the rate of 4% per annum to a firm in which the assessee was a partner. The assessee could not point out the precise business purpose which was served

> by borrowing the money at the rate of 14% p.a. From a person within the group ;and lending the same at 4% p.a. to another business entity within the same group. The learned CIT (A) has examined each and every aspect of the case carefully and in detail. We do not wish to reiterate them. However, we do wish to record that we are in complete agreement with the order and reasoning given by the learned CIT(A) confirming the impugned disallowance. We endorse his order."

The aforesaid order is a subject matter of challenge in this appeal as referred hereinabove.

6. The learned counsel appearing for the appellant/ assessee submits that the investment made by the assessee was out of the business expediency and as per clause (6) of the partnership deed the capital contribution can fetch interest @ 4% only. He, thus, submits that in no case the appellant/ assessee could have received interest more than 4% as such transaction is by way of capital contribution warranting deductions as claimed. Reliance has been placed on the judgment of the Apex Court in the case of ***C.I.T. v. Ramniklal Kothari***, (1969) 74 ITR 57 (SC) and of this Court in the case of ***Phiroze H. Kudianavala v. C.I.T.***, (1978) 113 ITR 873 (Bom) to claim deductions.

7. Having heard the rival parties and having considered the factual aspects involved; in the light

of the judgments cited, in our view, the reliance placed on the above-referred judgments is misplaced. The authorities below after taking into account factual aspect of the matter recorded findings of fact that interest liability has been manufactured and/or artificially created in the hands of the appellant/ assessee with a view to avoid tax liability. In addition to this both the authorities below found that no business expediency was involved in the subject transaction and that it was a colourable transaction resorted absolutely with a view to avoid incidence of tax. Attributes of capital contribution were completely absent in the subject transaction. Apart from this, it has also been recorded by the CIT (Appeals) and affirmed by the Tribunal that the differential interest was rightly disallowed in view of section 48(2) of the Act.

8. In the aforesaid backdrop, in our considered opinion, no substantial question of law is involved in this appeal. The view taken by the authorities below is a reasonable and possible view in the facts and circumstances of the case. In the result, appeal is dismissed in limine with no order as to costs.

(V.C. DAGA, J.)

(N.A. BRITTO, J.)